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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. [redacted] 117

CENTRAL LOUISIANA ELECTRIC COMPANY, INC., LOUISIANA POWER & LIGHT COMPANY and GULF STATES UTILITIES COMPANY;

Petitioners,

—v.—

RURAL ELECTRIFICATION ADMINISTRATION, NORMAN M. CLAPP, Administrator of the Rural Electrification Administration; THE UNITED STATES DEPARTMENT OF AGRICULTURE, and ORVILLE L. FREEMAN, Secretary of The United States Department of Agriculture,

Respondents.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

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October 31, 1966

(*continued on inside cover*)

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Petitioners pray that this Court grant rehearing of its order of October 10, 1966, denying the petition for writ of certiorari and that a writ of certiorari issue to review the judgment of the Court of Appeals for the Fifth Circuit in this case, as prayed for in the petition filed herein.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT

1. At the time of this Court's order of October 10, 1966, there was no direct conflict of circuit court decisions on the questions presented. There was, however, a conflict between the decision of the court below and that of a district court on the availability of judicial review based on allegations that the Administrator of the R.E.A. failed to comply with the loan procedures contained in REA Bulletin 111-3. (Pet. 29-33). In *Northern States Power Company v. Rural Electrification Administration*, 248 F.Supp. 616 (D. Minn. 1965), the court reviewed the arguments which have been presented by respondents in this case, considered the effect of a violation of the bulletin in light of *Service v. Dulles*, 354 U.S. 363, and *Accardi v. Shaughnessy*, 347 U.S. 260, with which the decision below conflicts in principle, and concluded that "judicial review is available to plaintiffs on the allegation that the R.E.A. has not complied with the procedures contained in Bulletin 111-3 in the granting of the loan to East River." 248 F.Supp. 616, 624.

2. After this petition was filed, *Northern States Power Company v. Rural Electrification Administration*, *supra*, was appealed to the United States Court of Appeals for the Eighth Circuit.* That appeal came after the district court granted a preliminary injunction, notwithstanding the decision of the court below, following the refusal of defendants to produce certain documents for an *in camera* inspection. The appeal of that case to the Eighth Circuit was indicated to this Court in

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*The order giving rise to the appeal is set forth in the appendix hereto.

petitioners' reply brief. It was since learned that the case will be given a preferential hearing on November 14, 1966. While it will soon be known whether that case will give rise to a direct conflict between the circuits regarding judicial review of a violation of REA Bulletin 111-3, the decision of the Eighth Circuit will probably not be rendered prior to the time that this Court would ordinarily act on this petition for rehearing.

3. Whether a violation of REA Bulletin 111-3 merits judicial review is a question of general importance, even if considered apart from the effect of that question as related to other agency regulations. Rural electrification in the United States has been virtually achieved. Increasingly, the R.E.A. will devote its funds to generation and transmission loans, and REA Bulletin 111-3 will play a vital role in the consideration of many such loans throughout the United States. The private power suppliers with which the R.E.A. is required to deal under the bulletin should have the benefit of this Court's pronouncement on whether they have any enforceable rights under the regulation, or whether their bona fide participation in the Bulletin 111-3 procedures may be meaningless. Therefore, the determination by this Court of whether this regulation may be enforced judicially will be just as important to the rest of the country as it now is to petitioners and the people of Louisiana.

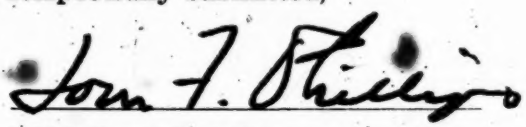
CONCLUSION

For the reasons set forth above and in the petition for writ of certiorari, it is urged that rehearing be granted or, in the alternative, that action on this petition therefor be delayed

pending the anticipated early decision by the Eighth Circuit, and that, upon rehearing, a writ of certiorari be granted.

October 31, 1966.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Tom F. Phillips, one of the attorneys for petitioners and a member of the Bar of the Supreme Court of the United States, hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the rules of this Court, and I further certify that on the 1st day of November, 1966, I served copies of this petition for rehearing on respondents herein by depositing the same in the United States Post Office, with air mail postage prepaid, addressed to the following parties:

Solicitor General of the United States
Department of Justice
Washington 25, D. C.

John W. Douglas
Assistant Attorney General
Alan S. Rosenthal
Harvey L. Zuckman
Department of Justice
Washington, D. C. 20530
Attorneys for Respondents in the court below

Rural Electrification Administration
and its Administrator, Norman M. Clapp
Washington 25, D. C.

United States Department of Agriculture
and its Secretary, Orville L. Freeman
Washington 25, D. C.

Tom F. Phillips

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APPENDIX

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

NORTHERN STATES POWER COMPANY, a corporation, and OTTER TAIL POWER COMPANY, a corporation, Plaintiffs, - Vs - RURAL ELECTRICFICATION ADMINISTRATION; NORMAN M. CLAPP, as Administrator of the Rural Electrification Administration; THE UNITED STATES DEPARTMENT OF AGRICULTURE; ORVILLE L. FREEMAN, as Secretary of the United States Department of Agriculture; and JOHN DOE and MARY ROE whose true and correct names are unknown to plaintiffs, Defendants.	4-65-Civ-260 MEMORANDUM AND ORDER GRANTING PRELIMINARY INJUNCTION AND PRELIMINARY INJUNCTION

The above captioned matter came on for hearing on June 21, 1966, pursuant to a motion by plaintiffs for a preliminary injunction to continue until final determination of this action. Messrs. Kenneth W. Green, Joe A. Walters, Cyrus A. Field and Arland D. Brusven appeared for the plaintiffs in support of their motion. Mr. Robert J. Wieferich of the

Department of Justice appeared for defendants in opposition thereto.

Plaintiffs initiated this action on August 12, 1965, asserting several grounds for jurisdiction and venue; 28 USCA 1361, granting district courts original jurisdiction in actions and nature mandamus; 5 USCA 1009, Sec. 10(a) of the Administrative Procedure Act, granting judicial review of administrative action in certain situations; 28 USCA 2201, dealing with declaratory judgments; 26 USCA 1331, granting original jurisdiction to district courts when the matter in controversy exceeds the value of $10,000.00 and arises under the Constitution, laws or treaties of the United States; and 28 USCA 1391, concerning venue in cases where each defendant is an employee or officer of the Federal Government acting in his official capacity.

By their complaint plaintiffs seek to challenge a loan approved by the REA, pursuant to the Rural Electrification Act of 1936, 7 USC 901, et seq, to the East River Electric Power Cooperative, Inc. on May 26, 1965, in the amount of $5,919,000.00. Plaintiffs claim the loan is illegal because consummated in violation of REA Bulletin 111-3, 29 Federal Register No. 40, pages 2765-66, which establishes certain rights in favor of power suppliers such as plaintiffs and imposes certain duties upon the REA and its Administrator. At the commencement of this litigation plaintiffs moved for a preliminary injunction and shortly thereafter defendants moved for a dismissal of this action or, in the alternative, for summary judgment.

On December 31, 1965, this Court entered its Memorandum and Order whereby, among other things, defendants'

Motion for dismissal or for summary judgment and plaintiffs' motion for preliminary injunction were denied. See 248 F. Supp. 616.

A review of the record on file in the office of the Clerk of this Court indicates, among other things:

(a) On January 19, 1966, this Court denied defendants' motion for a dismissal of this action, or in the alternative for a modification of this Court's Order of December 31, 1965, and directed that all parties may proceed to take depositions and pursue discovery proceedings in accordance with the Federal Rules of Civil Procedure;

(b) On January 19, 1966, plaintiffs moved this Court for an Order requiring defendants to produce certain documents in their possession, and permit plaintiffs to inspect and copy the same preliminary to the taking of certain depositions (which depositions were also noticed on January 19, 1966, for oral examination on February 22, 1966) by oral examination of defendants and certain of their employees and agents at a time shortly after plaintiffs had an opportunity to inspect and copy said documents;

(c) On January 25, 1966, defendants served their answer to plaintiffs' complaint;

(d) On January 28, 1966, plaintiffs filed a Notice of Trial of this litigation to be tried as a court case at the general term of this Court commencing March 1, 1966;

(e) On February 15, 1966, defendants opposed plaintiffs' motion as to certain documentation on the grounds of failure of good cause being shown and said documentation being irrelevant and immaterial;

(f) By Order dated February 15, 1966, this Court granted plaintiffs' motion for the production, inspection and copying of certain documents with inspection to commence in Washington, D. C. on March 7, 1966;

(g) On March 2, 1966, defendants moved this Court for a protective order under Rule 30(b) of the Federal Rules of Civil Procedure based upon claims of privilege;[1]

(h) On April 5, 1966, defendants presented to this Court a copy of a report dated February 10, 1966, of the Comptroller General of the United States of "Examination into Alternative Transmission Plans Considered Prior to Approval of a Loan to East River Electric Power Cooperative, Inc.";

(i) On May 5, 1966, trials of non-jury cases were commenced that had been regularly placed upon the spring general term calendar of this Court and the trials of said non-jury cases as well as jury cases placed upon said general term calendar are substantially completed;

(j) On May 12, 1966, this Court ruled on defendants' motion for a protective order and in essence withheld final determination of defendants' claims of privilege pending an *in camera* inspection by this Court of the documentation in question; defendants were granted fifteen days to produce the documents for *in camera* inspection;

(k) On May 20, 1966, defendants, without requesting a stay of this Court's order for *in camera* inspection,

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[1] Defendants' claims of privilege relate to two groups of documents, the first of which generally consist of memorandum, letters, reports, and other communications between and among various employees and officials within the Department of Agriculture and the Rural Electrification Administration; the second group of documents consist almost entirely of communications between the Government and the East River Electric Power Cooperative, Inc and further intra-governmental communications.

noticed a further motion returnable on June 13, 1966, to modify the previous order of this Court for *in camera* inspection by adding language which would in substance require this Court to return the documents which would be produced by defendants for *in camera* inspection directly to the defendants prior to this Court's ruling thereon;

(l) At the hearing on June 13, 1966, this Court denied defendant's motion to modify its previous Order requiring *in camera* inspection;

(m) On June 16, 1966, defendants filed with this Court a formal written statement declining to produce the withheld documents for *in camera* inspection.

As this Court reads the complaint which initiated this action and various affidavits filed in support of plaintiffs' position, the plaintiffs assert no right to challenge the authority of the REA to grant loans or for that matter to grant the loan in question. Rather, plaintiffs claim REA Bulletin 111-3 is a duly promulgated regulation having the force and effect of law and binding upon the REA and the Administrator and that a loan approved without adherence to it invades the plaintiffs' rights and entitles them to judicial review of the agency action.

This Court previously concluded that judicial review is available to plaintiffs on the allegation that the REA has not complied with the procedures contained in its Bulletin 111-3. Plaintiffs contend that the documentation withheld by defendants reflects the procedures followed in the determination to grant the loan to East River Electric Power Cooperative, Inc. and that such procedures did not follow the legal requirements for granting such a loan. No alternate sources of the

information which plaintiffs seek has been suggested to this Court by the defendants and this Court finds that the kind of information contained in the documentation to which defendants have asserted a claim of privilege is not otherwise available to the plaintiffs.

In this posture of the litigation the Court believes that the documentation withheld by the defendants from this Court's *in camera* inspection preliminary to a ruling on the adequacy of claims of privilege may, and upon inspection by this Court it may not, be absolutely essential to be produced for inspection if the litigants are to secure a just determination of their respective claims. The thwarting of a determination by this Court of claims of privilege of such documentation will necessarily result in delays in preparation for trial and the trial of the action itself.

At the time of this Court's Order of December 31, 1965, denying defendants' motion to dismiss, it was contemplated that this litigation would quickly move forward by way of discovery proceedings so as to permit an adjudication on the merits at the spring 1966 general term of this Court which is now practically concluded. The Court finds that plaintiffs and their counsel have been diligent in attempting to bring this litigation to a final conclusion. Plaintiffs promptly placed this case on the general term calendar commencing March 1, 1966 and immediately proceeded to invoke discovery proceedings under the Federal Rules of Civil Procedure as an aid to preparation for trial. It is apparent that defendants' refusal to produce the documentation in question for this Court's *in camera* inspection preliminary to a ruling on claims of privilege is going to prevent this litigation soon being brought on for trial or, if brought on for trial, a determination of

the issues without considerable delays occasioned by requests and refusals over documentation which in and of itself may be determinative of the issues presented to this Court for final determination.

This Court expressed the opinion, at the time of its Order of December 31, 1965, that plaintiffs at this stage of the proceedings had not demonstrated sufficient likelihood of success on the merits so as to justify preliminary injunctive relief. Further, anticipating early trial no showing of irreparable harm was manifest. Defendants' conduct has made an early trial impossible. Such conduct will frustrate a just determination of this litigation and its final disposition from this Court's calendar.

This Court finds that the intentional and wilful refusal of the defendants to produce the documents in question for an *in camera* inspection preliminary to a ruling on claims of privilege indicates that the documents would prove, or help to prove, the basic and essential facts supporting plaintiffs' claim for relief as alleged in their complaint. Such a finding is supported by the report dated February 10, 1966, of the Comptroller General of the United States in which the Comptroller General stated as an overall conclusion:

> "On the basis of our review of the cost and feasibility of the straight-wheeling, joint, and independent transmission plans considered by REA prior to its approval of the independent plan, we believe that, solely on the basis of the foreseeable benefits of the joint plan—that is, estimated savings of $647,000 of investments over a longer period of time and estimated savings of $130,000 in costs of operation during a 10-year period—adoption of the joint plan would have resulted in greater economies

to East River than would the adoption of the independent plan. In addition, REA considered the joint plan to offer a more reliable system than the independent plan offered.

"We note that, in approving the independent plan, REA cited certain possibilities for achieving economies under this plan which might offset the foreseeable benefits of the joint plan. The Administrator stated that, while no one of the factors, as discussed in this report, when considered separately, might have resulted in the approval of the independent plan, the combination of these factors would justify approval of the independent plan.

"We believe that REA did not fully explore the possibilities discussed in this report in order to ascertain their likelihood of occurring and the resultant effect on the alternative plans. To what extent the results of further exploration might have affected REA's decision to approve the independent plan cannot be measured as of the time of loan approval; nor is it evident, as of December 31, 1965, that developments subsequent to the loan approval have either confirmed or disproved that such possibilities will materialize."

At this stage of the proceedings and based upon the entire record now before me, including affidavits on file and the Comptroller General's Report submitted by the defendants, this Court finds and concludes that there has been a prima facie showing of non-compliance with the applicable regulations; that the defendants' conduct lends further support to this finding and conclusion. Upon the entire record the Court accordingly finds and concludes that there is sufficient factual showing and sufficient likelihood of success by the plaintiffs on the merits so as to justify preliminary injunctive relief; that the maintenance of a status quo pending final disposition of this litigation is necessary so as not to render

the substantive issues moot; that plaintiffs will suffer irreparable harm by the delays that have now become apparent and that without injunctive relief plaintiffs may be deprived of their justicible rights before a final determination on the merits. Accordingly, the requisite factual showing for preliminary injunctive relief, as prayed for in plaintiffs' motion, is now apparent.

Independently of the foregoing, the facts which have been designated as established for purposes of this case by separate Order of this Court relating to sanctions under Rule 37 would alone require temporary injunctive relief.

Therefore, it is:

ORDERED, That plaintiffs' motion for a preliminary injunction in the above captioned action to continue until the final determination thereof be, and it hereby is, granted;

ORDERED FURTHER, That, pending further Order of this Court, the above named defendants, and each of them, and all other persons who are or may be under the control of them, or either of them, and all persons to whom knowledge of such injunction shall come be, and they hereby are, restrained and enjoined from (i) consummating or participating in consummation of that certain loan to East River Electric Power Cooperative, Inc. in the amount of $5,919,000.00 under the provisions of the Rural Electrification Act of 1936, as amended, and (ii) distributing, expanding or using any of the proceeds of the said loan approved by the Rural Electrification Administration on or about May 26, 1965, pursuant to an application by East River Electric Power Cooperative, Inc. filed on or about May 26, 1964.

ORDERED FURTHER, That the injunction bond of the plaintiffs in the amount of $1,000.00 approved as to form and surety by Order of this Court dated June 21, 1966, and filed in the office of the Clerk of the above named Court on June 22, 1966, stand as the bond relating to this injunction.

IT IS SO ORDERED.

s/ EDWARD J. DEVITT

Edward J. Devitt, Chief Judge

Dated at Minneapolis, Minnesota
this 27th day of June, 1966.